

No. 15,788

IN THE

United States Court of Appeals
For the Ninth Circuit

CITY OF ANCHORAGE,
a municipal corporation,

Appellant,

vs.

ALASKA DAIRY PRODUCTS CORPORATION,

Appellee.

REPLY BRIEF FOR APPELLANT.

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INTRODUCTION.

Appellant and Appellee have already set forth statements of the case and no further statement is necessary, however one point in Appellee's statement should be considered for clarification. Appellee says in his statement of the case (Appellee's brief, page 3): "Counsel for Appellant and Appellee have stipulated that this Court may consider the fact that, in 10-297-C, George C. Shannon and B. W. Boeke testified that the intent of the parties was that 'property' meant real and personal property, and that George G. Jackson testified that the intent of the parties was that 'property' meant real property alone." It is stipulated

that this was the testimony elicited in the Justice Court, however, unless this Court makes it part of the record it should not be considered as part of the record, and Appellant has not stipulated that it may be considered. The stipulation as to the testimony in the Justice Court is not material to a determination of this appeal. Appellee has indicated ten primary questions which he considers necessary to a determination of this appeal. Appellant's argument will follow as closely as possible Appellee's brief except that Point 1 and Point 10 will be considered together at the beginning.

ARGUMENT.

APPELLEE'S ARGUMENTS 1 AND 10.

Appellee's first statement suggests agreement with our position that the Court erred, at least in its reasoning. Appellee says: "The reason stated by the District Court for entering the judgment appealed from is immaterial." (Appellee's brief, page 7.) Appellant submits, no further reason for dismissing Appellant's complaint can be found. Appellee does attempt to support the ruling of the District Court in its 10th Point, although it seems inconsistent with the first argument. Appellee states: "The law is established that the doctrine of *res judicata* operates as a bar not only as to what was litigated but as to what could have been litigated." (Appellee's brief, page 43.) Appellant has urged that the remedy of reformation and the issues involved in reformation

could not have been litigated in the Justice Court. (Appellant's brief, page 8.) Nor could a declaratory judgment be sought. Appellee fails to show specifically what issues have been or could have been litigated in the initial cause of action in the Justice Court. Appellee then takes the apparent erroneously applied principle of *res judicata* and asks this Court to extend that principle to whatever courts were available. (Appellee's brief, page 43.) Appellee cites no authority for this novel theory, apparently an original one. The final blow to the principle of *res judicata* as a valid reason that will sustain dismissal of Appellant's complaint is dealt by Appellee on page 44, where Appellee says: "If this Court sees fit, however, to limit the doctrine of *res judicata* to matters actually adjudicated, Appellee does not contend under this limited application of the doctrine, that the declaratory judgment relief will be barred, but Appellee does contend that, even under this limited application of the doctrine, the relief of reformation will be barred." Appellant argues if any claim for relief can stand then the Court erred in dismissing the complaint. The proper remedy would have been a motion to strike the improper portions.

APPELLEE'S ARGUMENT 2.

The second point, Appellee raises for consideration by this Court (Appellee's brief, page 8) seems to be a matter of policy Appellee hopes will be adopted. Appellant's mistake was to begin in the Justice Court.

When this case was appealed it attempted by way of amendment (Transcript page 19) to settle everything in one action which was denied when the Court denied Appellant's motion for leave to amend. (Transcript page 26.) As authority for Appellant's "policy" argument Rule 13, Federal Rules of Civil Procedure is quoted, which rule applies to counterclaims. Appellee assumes that declaratory judgment would be futile. (Appellee's brief, page 13.) For purposes of a motion to dismiss, the allegations in the complaint are considered as true, whether or not relief prayed for would be futile depends on the merits of the case and thus should not be considered by this Court.

APPELLEE'S ARGUMENT 4.

Appellee then queries "Is Appellant estopped from maintaining A-13,503?" (Appellee's brief, page 13.) Appellee is confused. First he indicates that Appellant thought that a judgment in the Justice Court would conclude the matter then urges that the Appellee had a right to rely on the fact that an appeal to the District Court would end litigation. Further confusion is added when Appellee misstates the fact by saying: "In opposing the amendment to the complaint in A-13001." (Appellee's brief, page 14.) Appellee opposed the motion to amend the complaint. Further references in this argument are to annoyance, expense and inconvenience, which language runs consistently through the Appellee's brief as an apparent attempt to appeal to the emotions.

APPELLEE'S ARGUMENT 5.

The next argument apparently deals with waiver. (Appellee's brief, page 15.) No authority is urged to back Appellee's argument of waiver as the basis of dismissing Appellant's complaint. It is difficult to see how plaintiff-appellant can waive a right it did not have, that right being a right to sue for reformation and to bring an action in the nature of declaratory judgment, said action not being within the jurisdiction of the Justice Court.

APPELLEE'S ARGUMENT 6.

Although Appellee queries "Are there multiple causes of action here or but a single cause of action in multiple remedies?" (Appellee's brief, page 16.) This question proposed by Appellee is left unanswered, although the declaratory judgment act is discussed. True, the declaratory judgment act is procedural but the allegations in Appellant's complaint (Transcript page 27) which for purposes of this appeal must be taken as true present a different factual situation than do the allegations in the complaint in the Justice Court in Cause No. 10-297-C. (Transcript page 3.) The two complaints (Transcript page 3 and page 27) do not involve the same cause of action or claim for relief.

APPELLEE'S ARGUMENT 7.

Appellee then deals with election of remedies (Appellee's brief, page 19) citing certain authorities, the first of which was *U. S. v. Oregon Lumber Co.*, 260 U.S. 290. It should be noted that in the above cited case certain remedies were available to the Government and the case began in a Court of General jurisdiction. Appellee has quoted extensively from the *Oregon Lumber* case in which the plaintiff-government proceeded to judgment. In this action the remedy of reformation and procedure under the declaratory judgment act were not available to Appellant in the Justice Court. When the proceeding came to the District Court on appeal Appellant attempted to amend by adding the additional claims for relief or counts in the full belief that all the matters in dispute between the two parties could be tried in one suit. Appellee then urges that a declaratory judgment asking the contract be declared void is inconsistent with the suit on a contract to enforce the same. Appellant agrees, that at some point an election must be made but the Federal Rules, Rule 8, provide for alternative and inconsistent pleading. No election need be made at the pleading stage. Appellee then urges with some doubt that the doctrine of election of remedies also bars the suit for reformation. (Appellee's brief, page 23.) Again the reply but reformation was not available in the Justice Court and also it is not inconsistent. Appellee conveniently discusses certain cases which hold that a suit on a contract is no bar to a later suit for reformation. (Appellee's brief, page 24.) However, as Appellee has found cases not favorable

he does not favor the court nor the Appellant with the names of such cases. Appellee then discusses *Einsiedler v. Massari*, 78 Atl. 2d 572. The suit in that case went to judgment and the appeal was affirmed. Then the defendant attempted to start a new action seeking reformation. Here Appellant sought reformation in the District Court when the remedy became available for the first time. When not allowed to amend, Appellant filed a new complaint. In *Hennepin Paper Company v. Fort Wayne Corrugated Paper Company*, 153 F. 2d 822, cited by Appellee (Appellee's brief, page 26) the first suit was begun in the District Court and went to judgment, unlike the instant case. Appellant submits that there is no inconsistency between a suit on a contract in the Justice Court for a determination of the meaning of the word "property" and a suit to reform the contract. Although the judgment in the Justice Court was unfavorable to Appellant and the word "property" was interpreted in favor of the Appellee, this should not bar a later suit for reformation where the Appellant is able to prove the necessary facts to entitle him to a reformation. Appellee seems to confuse the doctrine of election of remedies with some theory of election of Courts which he proposes as a logical extension. The doctrine of election of remedies implies that the remedy was available at the time the election was made. Appellant attempted to avail itself of all remedies when they became available in the District Court as is shown in the motion for leave to file amended complaint. (Transcript page 20.) Further discussion of the *Hennepin* case by Appellee (Appel-

lee's brief, page 29) does point out the fallacy of Appellee's earlier argument about inconsistent remedies.

APPELLEE'S ARGUMENT 8.

Next Appellee queries "What acts constitute a conclusive election under the doctrine of election of remedies?" (Appellee's brief, page 31.) In proposing this doctrine Appellant assumes that the initial suit based on the complaint (Transcript page 3) was the same as the later suit for reformation. Appellant submits the first suit begun in the Justice Court (Transcript page 3) after the stipulation was entered into became a suit for an interpretation of a contract. Reformation is not the same as interpretation. (*Corbin on Contracts*, Volume 3, page 54.) In *Sadowski v. General Discount Corporation*, 81 F. Supp. 381, plaintiff lost a suit on a contract, then brought a suit to reform. It was held in that the first suit was not *res judicata* and apparently no election of remedies had been made as the two suits were not inconsistent. This case was affirmed in 183 F. 2d 592 allowing the second suit where the Court said the second suit to reform should be allowed; the ruling was partially based on the fact that under Michigan Law the Courts of Law and the Courts of Equity were separate. Here Appellant is faced with partially the same problem. The Justice Court is a Court of limited jurisdiction and certain types of suits, namely, the equitable suits are not allowed. (Opening brief, page 8.)

APPELLEE'S ARGUMENT 9.

Appellee next queries "Do the Federal Rules of Civil Procedure bar Appellant from maintaining A-13,503?" (Appellee's brief, page 36.) Appellee apparently has no answer to this question either but asserts (Appellee's brief, page 42), this Court should affirm the dismissal of the complaint based on "logic" "and good policy". Appellee submits that there is every reason to avoid piecemeal litigation. Had the District Court not ruled at Appellee's urging that the complaint could not be amended there would still only be one case. It would seem part of Appellee's vexation is at his own doing.

CONCLUSION.

As Appellee has not sustained the burden of upholding the District Court's dismissal of Appellant's action, it is urged that the District Court be reversed and the cause remanded and Appellee be required to answer.

Dated, Anchorage, Alaska,
May 8, 1958.

Respectfully submitted,

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